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Supreme Court, U.S.
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NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

RESOLUTION TRUST CORPORATION as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER BFP ON THE MERITS

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Petition for Certiorari filed February 16, 1993

Certiorari Granted May 24, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

[RULE 24.1(a)]

The questions presented for review are:

1. Does the price received at a non-collusive regularly conducted foreclosure sale establish irrebuttably the reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

2. Does mere compliance with state laws on foreclosure prevent avoidance in bankruptcy of a non-collusive foreclosure sale as a sale for less than reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

3. Does the requirement in 11 U.S.C. Section 548(a)(2) of reasonably equivalent value create a federal standard concerning the power of trustees and debtors in possession in bankruptcy to avoid pre-bankruptcy foreclosure sales?

LIST OF THE PARTIES

[RULE 24.1(b)]

All of the parties to the above entitled action are named on the cover of this brief in the name of the action.

TABLE OF CONTENTS

[RULE 24.1(c)]

	PAGE
QUESTIONS PRESENTED FOR REVIEW [RULE 24.1(a)]	-i-
LIST OF THE PARTIES [RULE 24.1(b)]	-ii-
CITATIONS OF OPINIONS AND JUDGMENTS [RULE 24.1(d)]	2
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC. INVOLVED [RULE 24.1(f)]	7
STATEMENT OF GROUNDS OF JURISDICTION OF THE UNITED STATES SUPREME COURT [RULE 24.1(e)]	4
STATEMENT OF THE CASE [RULE 24.1(g)]	8
A. PROCEEDINGS BELOW	8
B. FACTS	9
1. Allegations of the Complaint	9
2. Evidence of Quiet Title Action (BFP v. Pedersen) in Support of all Motions	13
3. The Judgment in the State Court (BFP v. Pedersen)	16
4. Declaration in Opposition to the Motion for Summary Judgment	17

TABLE OF CONTENTS

	PAGE
SUMMARY OF ARGUMENT [RULE 24.1(h)]	21
ARGUMENT [RULE 24.1(i)]	24
A. UNDER THE STANDARD OF REVIEW BY THIS COURT OF THE LOWER COURT DECISIONS IN THIS CASE, THERE IS NO SUBSTANTIAL FACT IN FAVOR OF RESPONDENTS.	24
B. THE PLAIN UNAMBIGUOUS LANGUAGE OF 11 U.S.C. 548 INCLUDES FORECLOSURES IN THE AVOIDANCE POWERS	27
C. IF THE PURPOSE OF 11 U.S.C. 548 IS TO BE CONSIDERED, INCLUSION OF FORECLOSURES IS CONSISTENT AND EXCLUSION OF FORECLOSURES INCONSISTENT WITH THE PURPOSE.	33
D. MOST COURTS OF APPEAL HAVE DECIDED THE ISSUE IN ACCORD-ANCE WITH PETITIONER'S CONTENTIONS AND THEIR REASONING IS PERSUASIVE.	40
E. A FORECLOSURE SALE IS A TRANSFER.	44
F. BFP IS ENTITLED TO THE EXCEPTION RECOGNIZED IN THE BAP MADRID DECISION.	47
G. RELIEF OTHER THAN RESTORA-TION OF THE PROPETY IS AVAILABLE.	48
H. THE DEBTOR HAS AN INTEREST IN THE PROPERTY WHICH WAS TRANSFERRED	48
CONCLUSION	48

TABLE OF AUTHORITIES

[RULE 24.1(c)]

CASES	PAGE
Abramson v. Lakewood Bank & Trust Co. 647 F.2d 54 (5th Cir.) cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320	40
Barrett v. Commonwealth Federal Savings Ass'n. 939 F.2d 20, (3rd Cir. 1991)	42
Bundles v. Baker, (In re Bundles 856 F.2d 815 (7th Cir. 1988) 18 BCD 554, CCH Bankr.	32,33,42,43
Conley v. Gibson 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957)	25
de Alvarez, Chirinos v. Creole Petroleum Corp. 613 F.2d 1240 (3rd Cir. 1980)	26
Durrett v. Washington National Insurance Company 621 F.2d 201 (5th Cir. 1980)	40
Federal Deposit Insurance Corp. v. Blanton 918 F.2d 323, 327 (8th Cir. 1984) (cert. denied) 469 U.S. 990, 105 S.Ct. 380, 398, 83 F2d 331 (1984)	41

	PAGE
First Fed Sav. & Loan Ass'n, Bismark v. Hulm, (In re Hulm) 738 F.2d 323, 327 (8th Cir. 1984) cert. denied 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 331 (1984)	32,41
In re Alcala 918 F.2d 99, 103	27
In re Arctic AirTemp, Inc. 68 B.R. 71, 74 (1986)	27
In re BFP (BFP v. Imperial Savings & Loan Association 974 F.2d 1144, 1148 132 B.R.748 (BAP 9th Cir. 1991)	2,34
In re Coleman, 21 B.R. 832, 836-7	48
In re Ehring 91 B.R. 897 (9th Cir. BAP 1988) 900 F.2d 184 (9th Cir. 1990)	43,44
In re Kirkland 915 F.2d 1236, 1238, (9th Cir. 1990)	26
In re Lindsay, 98 B.R. 983-992-3 (Bkrtcy. S.C.Cal.1989)	48
In re Madrid, (Madrid v. Lawyers Title Ins. Corp.) 21 B.R. 424 (9th Cir. BAP 1982), aff'd on other grounds, no transfer, 725 F.2d 1197 (9th Cir. 1984), cert. denied 469 U.S. 833, 83 L.Ed 66, 105 S.Ct. 125 (1984)	21,29,45,46

	PAGE
In re Nance, 26 B.R. 105 (Bkrtcy S.D. Ohio 1982)	48
In re Tome, 113 B.R. 626, (Bkrtcy. C.D. Cal. 1990)	48
Kelson v. Springfield 767 F.2d 651 (9th Cir. 1988)	25
Matter of Grissom 955 F.2d 1440 (11th Cir. 1992)	41
Matter of Winshall's Settlors' Trust 758 F.2d 1136 (6th Cir. 1985)	44
Toibb v. Radloff 501 U.S.____, 115 L.Ed. 2d 145, 152, 111 S. Ct. 2197, 2200 (1991)	31
Union Bank v. Wolas 502 U.S. ____, 116 L. Ed.2d 514, 112 S.Ct. 527, 534, 22 BCB 574, 25 CDC 2d 1011, CCR Bankr. L.Rptr. para.74,296A	29
United States v. James 478 U.S. 597, 92 L.Ed.2d 483, 493, 106 S. Ct. 3116	30
United States v. Turkette 452 U.S. 576, 69 L. Ed.2d 246, 101 S. Ct. 2524 1981)	31
Vette Co. v. Aetna 612 F.2d 1076, 1077 (8th Cir. 1980)	26

	PAGE
CONSTITUTION	
United States Constitution Article 1, Section 8, Clause 4	8
STATUTES	
Bankruptcy Act Section 67(d)	39
11 U.S.C. 101	28,44
11 U.S.C. 101(54)	8
11 U.S.C. 101[58](54)	43
11 U.S.C. 547	45
11 U.S.C. 547 (d)	42
11 U.S.C. 548	5,22,27,28,33,34,44
11 U.S.C. 548(a)(2)	6
11 U.S.C. Section 548(a)(2)(A)	8,27
11 U.S.C. 548(a)(2)(B)(i)	27
11 U.S.C. 1107	8
28 U.S.C. Section 158(a)	6
28 U.S.C. 158 (a) and (b)	7
28 U.S.C. 158(b)	6
28 U.S.C. 158(d)	7
28 U.S.C. 1254(1)	4
28 U.S.C. 1334(b)	5
RULES	
	PAGE
Bankruptcy Rule 8001(a)	6
Bankruptcy Rule 8002	6
Bankruptcy Rule 8015	7
Rules of Appellate Procedure Rule 4(a) and (b)	7

TEXTS	PAGE
Ehrlich, Scott B. "Avoidance of Foreclosure Sales as Fraudulent Conveyances, Accommodating State and Federal Objectives" 71 Va L. Rev. at 962 (1985)	35, 38
Kennedy, Frank R., "Involuntary Fraudulent Transfers" Volume 9, Cardoza Law Review, December 1987, p. 542, 578-580	36
Haines, Randolph J. "Ninth Circuit Rejects Durrett" 1992, 93-No.4, Norton Bankruptcy Law Adviser, pp. 9-10	37
Schuchman, Philip "Data on Durrett" 9 Cardoza Law Review 605	39

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RESOLUTION TRUST CORPORATION, as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendants

BRIEF OF PETITIONER BFP ON THE MERITS

Petitioner, BFP, a Partnership, respectfully submits the following as its brief on the merits.

CITATIONS OF OPINIONS AND JUDGMENTS BELOW [RULE 24.1(d)]

In re BFP (BFP v. Imperial Savings & Loan Association), 974 F.2d 1144, 92 CDOS 7674, 23 BCD 705, 27 CBC 2d 1417, CCH Bank. L. Rptr. paragraph 74837 (9th Cir. 1992). Also, Appendix to Amended Petition for Writ herein, page 1.

In re BFP (BFP v. Imperial Savings & Loan Association), 132 B.R. 748 (BAP 9th Cir. 1991). Also, page 49, Appendix to Amended Petition for Writ.

Other orders and judgments to be reviewed have not been published. They are:

Judgment, Court of Appeals for the Ninth Circuit, Appendix to Amended Petition for Writ, p. 24.

Order, Court of Appeals for the Ninth Circuit, Denying Rehearing filed and entered on 11-17-92, Appendix to Amended Petition for Writ, p. 26.

Bankruptcy Court Order Dismissing Debtor's Complaint to Declare Transfer of Real Property Null and Void, etc. filed 3-6-90 and entered 3-8-90, Appendix to Amended Petition for Writ, p. 28.

Bankruptcy Court Findings of Fact and Conclusions of Law Re Motion for Judgment on Pleadings and/or Summary Judgment Dismissing Complaint filed on 7-10-90, Appendix to Amended Petition for Writ, p. 33.

Order for Summary Judgment (J. A. p. 354).

District Court Decision Affirming Bankruptcy Court Order Dismissing Complaint filed 4-8-91, Appendix to Amended Petition for Writ, p. 41.

District Court Order Denying Rehearing filed 5-6-91, Appendix to Amended Petition for Writ, p. 44.

STATEMENT OF GROUNDS OF JURISDICTION OF THE UNITED STATES SUPREME COURT [RULE 24.1(e)]

The judgment sought to be reviewed was entered in the Court of Appeals for the Ninth Circuit on September 8, 1992. A petition for rehearing was filed timely on September 22, 1992 and denied on November 17, 1992 (J.A. pp. 16-17).

The 90th day from the denial of the petition for rehearing was February 15, 1993, a court holiday, and the last day for filing this petition was February 16, 1993. The petition for writ was filed on February 16, 1993.

The Supreme Court of the United States has jurisdiction as provided in 28 U.S.C. Section 1254(1) and the petition is timely as provided in Rule 13.1 and 13.4.

The jurisdiction of this Honorable Court is invoked on the grounds that:

The decision of the United States Courts of Appeal for the Ninth Circuit to be reviewed is in conflict with the decisions of the United States Courts of Appeal in five other circuits. It holds that the bid at a noncollusive foreclosure sale is irrebuttably presumed to be the reasonably equivalent value.

Also, the decision decides an important question of federal law which has not been, but should be, settled by this court. That question is: Can a trustee in a bankruptcy avoid a noncollusive foreclosure sale conducted in accordance with state law?

The decision interprets 11 U.S.C. Section 548 contrary to its plain, unambiguous language, contrary to the decisions of this Court on statutory interpretation.

The Bankruptcy Court had jurisdiction under 28 U.S.C. Section 1334 (b) of

the adversary proceeding. The Complaint sought to avoid a sale under 11 U.S.C. 548(a)(2).

The District Court had jurisdiction of the appeal from the Order of the Bankruptcy Court dismissing as to PAUL OSBORNE and other individual defendants under 28 U.S.C. Section 158(a) and Bankruptcy Rule 8001(a). The order of the Bankruptcy Court was entered on March 8, 1990, and the "Second Notice of Appeal" was filed on March 14, 1990.

The Bankruptcy Appellate Panel (BAP herein) had jurisdiction of the appeal from the Summary Judgment "or" Judgment on the Pleadings in favor of Imperial Savings & Loan Association under 28 U.S.C. Section 158(b) and Bankruptcy Rule 8002. That Summary Judgment was entered on July 10, 1990 and the Notice of Appeal was filed on July 20, 1990.

The Court of Appeal had jurisdiction

of the appeal from the District Court under 28 U.S.C. 158(d) and the appeal was timely under Rules of Appellate Procedure Rule 4(a) and (b) and Bankruptcy Rule 8015. The District Court's Decision was entered April 8, 1991. A Motion for Rehearing was filed on April 12, 1991, and the latter was denied by Order entered May 6, 1991.

The Court of Appeal had jurisdiction of the appeal from the BAP under 28 U.S.C. Section 158(d). The latter's Opinion was filed November 5, 1991 and the Notice of Appeal filed November 15, 1991. The Opinion of the BAP is an appealable order as provided in 28 U.S.C. Section 158 (a) and (b).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC. INVOLVED [RULE 24.1(f)]

The only constitutional provisions, treaties, statutes, ordinances and regu-

lations involved are quoted in the Appendix to Amended Petition for Writ, pp. 69-74. They are:

Article 1, Section 8, clause 4 of the United States Constitution gives the Congress power to enact bankruptcy laws.

11 U.S.C. Section 101(54), the second of two 54s referred to as [58](54), formerly (40), defines transfer.

11 U.S.C. Section 548(a)(2)(A), provides that the trustee in bankruptcy may avoid certain pre-bankruptcy transfers for less than reasonably equivalent value.

11 U.S.C. Section 1107, gives a Debtor in Possession the powers of trustee under the Bankruptcy Code.

STATEMENT OF THE CASE [RULE 24.1(g)]

A. PROCEEDINGS BELOW

Petitioner filed an adversary com-

plaint to avoid the sale on foreclosure of a trust deed held by Imperial Savings Bank, sued herein as Imperial Savings & Loan Association, herein referred to as Imperial. The bankruptcy court granted the motion of the individual respondents for dismissal for failure to state a claim upon which relief can be granted (J.A. p. 2 entry 2-6-90; p. 3 DN 14) and later granted the motion of respondent Imperial for summary judgment or judgment on the pleadings (J.A. p. 4 entry 6-18-90; p. 5 on 40). Intervening courts and the Court of Appeal affirmed.

B. FACTS

1. Allegations of the Complaint.

On November 25, 1989, petitioner, BFP filed its Petition for Relief Under Chapter 11 of the U. S. Bankruptcy Code (J.A. p. 26).

Within a year prior thereto, on July

12, 1989, real property of the petitioner was sold at a foreclosure sale (J.A. p. 59). The foreclosure sale was under a trust deed held by Imperial which secured a note in the original amount of $356,250.00 (J. A. p. 48). That trust deed was senior to a $200,000.00 trust deed held by Sheldon and Ann Foreman (J.A. p. 50).

At the sale, respondent OSBORNE and the other individual respondents, purchased the property for $433,000.00 (J.A. p. 60; Trustee's Deed on Sale shows the actual figure to be $433,600.00 [J.A. p. 232]) when its value was over $725,000.00 J.A. p. 59).[1]

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1. Not in the record on the motion: public record of deed on resale shows documentary tax stamps indicating sale of $559,500.00 to $660,000.00 by deed dated December 21, 1989, recorded January 31, 1990 as Instrument No. 057406, Office of the Recorder, Orange County, California. The price was $660,000.00 (J. A. 351).

The Foremans owned the property (J. A. p. 43) and they, Barton and the Pedersens agreed to the sale to the Pedersens (J. A. p. 44) and they, Barton and the Pedersens agreed that the Pedersens give an option to Russell Barton. By an amendment, the Pedersens agreed to give the Foremans a trust deed for $200,000.00 instead of coins (J. A. p. 46), that the Pedersens and Russell Barton would form the partnership (J. A. p. 46) and the Pedersens deed the property to BFP (J. A. p. 47).

Pursuant to the agreements, a deed describing Pedersens as grantors and BFP as grantee was duly recorded (J.A. p. 49). As stated in 2 below, Wayne Pedersen had authority but not the written authority required under California law to cause his wife's name to be signed to the deed. However, thereafter, in breach of the agreements, they deeded it to

Off-Road Vehicles -- Recreation and Family Campground, Inc., Off-Road herein (J.A. p. 51).

Prior to the foreclosure sale, BFP, the Debtor, Sheldon Foreman, the junior lien holder, brought an action against Pedersens over title to the property. The foreclosure sale was originally set for December of 1988 and continued from time to time.

Sheldon Foreman and BFP requested respondent Imperial Savings & Loan, the beneficiary under the trust deed on which the foreclosure occurred, to defer the sale until after the state court determined title in the pending title action (J.A. p. 54). Mr. Foreman and BFP were informed that they would receive notice of the continued sale on foreclosure of a trust deed held by Imperial (J.A. p. 58) and requested notice of the continued sale date.

In December of 1988, an involuntary petition to adjudicate BFP insolvent was filed by Off-Road (J.A. p. 59). The petition by Off-Road showed the 1987 address of BFP, not a current address (J. A. pp. 53 and 55-56). Although Russell Barton, his counsel and counsel for Imperial appeared at the hearing at which the petition for involuntary bankruptcy was dismissed, no attempt was made to ascertain his correct address or send Imperial's motion for relief from stay to BFP at a current address or to its counsel (J. A. P. 55-57).

The only notice of the time and place of sale given was the statutory notice that a sale was to take place in 1988 and the oral pronouncements of continuances at the time and place set for the sale and continued sales (J.A. p. 59). The foreclosure sale occurred on July 12, 1989 (J.A. pp. 59-60).

2. Evidence of Quiet Title Action (BFP v. Pedersen) in Support of all Motions.

Respondents Osborne, et al. attached to their Motion to Dismiss and Imperial attached to its Declaration of Mary Caroom in support of its Motion for Summary Judgment a copy of the Tentative Decision and a copy of the Statement of Decision of the Superior Court in BFP v. Pedersen (J.A. pp. 252-281 and p. 315).

The Tentative Decision was that the Pedersens, Barton and the Foremans agreed to form a partnership (petitioner BFP) composed of Barton and the Pedersens, Marlene Pedersen did not sign the partnership agreement or the deed from the Pedersens to BFP, Wayne L. Pedersen had implied authority to sign her name but not written authority to make a deed on her behalf as required by California

statutes (J.A. pp. 254-255). That she was bound by the partnership contract and that their subsequent deed to Off-Road was a violation of the agreement and gave rise to a failure of consideration to the Foremans requiring rescission of Foreman's deed [to the Pedersens] and escrow instructions (J.A. p. 255).

It provided that "the Foremans were entitled to a decree quieting title to the subject real property against all named defendants, excluding Randy Jones." (J.A. p. 256). The Tentative Decision did not say that title be quieted against BFP. Again, at p. 257 the court said that the Foremans "are granted judgment of quiet title of the subject property against each of the defendants except Randy Jones" (J.A. p. 257).

The Statement of Decision by the court provided that "as to the issue of rescission between Sheldon Leroy Foreman

and Ann Fant Foreman, and defendants, Wayne L. Pedersen, Marlene M. Pedersen and Off-Road . . ., and Gary Dwight Henig of the deed" Foremans to Pedersen (J.A. p. 261-262) and the escrow instructions are rescinded (J. A. p. 261-263). The court said in its Statement of Decision that title should be quieted to the deed of trust and the real property "as against defendants" [not against plaintiff BFP, the petitioner designated] (J. A. p. 271). The court found that the Pedersens were not guilty of a fraud (J. A. p. 274).

3. The Judgment in the State Court (BFP and Foreman v. Pedersen).

Respondent Osborne et al in the Motion to Dismiss For Failure to State a Claim did not attach a copy of the state court judgment. Imperial did attach the same to its documents in support of its

Motion for Summary Judgment or Judgment on the Pleadings. In that judgment, the court ordered that plaintiffs Foreman have judgment that, "as between" Foremans and the Pedersens and Off-Road, the "deed" and escrow instructions be rescinded (J. A. p. 317-319).

It also ordered that "plaintiff B.F.P., Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple" (J. A. p. 319).

4. Declaration in Opposition to the Motion for Summary Judgment.

The second lienholder, Sheldon Foreman, had told Imperial that he would protect his interests but because of the title dispute did not want to do so in advance (J. A. p. 334). He reinstated the trust deed from default in 1988 (J. A. p. 335) and twice offered to purchase the trust deed from Imperial (J. A. p.

336-337). He had regularly contacted Imperial concerning the continuances of sale for a period of time (J. A. p. 336). In May of 1989 he was told by Imperial that no date had been set for the sale (J. A. p. 338) and he was told that he would be contacted about the sale date (J. A. p. 339). A broker's client had been attempting to purchase the property from the parties in the litigation (J. A. p. 340).

The Foremans owned the property from 1974 to August 25, 1987 (J. A. p. 345). Frank E. Barton offered to purchase the property and was trying to put together a partnership composed of a business acquaintance and Russell Barton, and that both Frank Barton and his son, Russell Barton, would contribute services in remodeling the property and then marketing it (J. A. p. 345). Wayne L. Pedersen was substituted in as the buyer and Frank

Barton and Russell Barton said that the specific partnership terms would be reduced to writing, that Russell Barton would be named as managing partner but Frank Barton would actually be conducting the affairs of the partnership (J. A. p. 348).

After Pedersens deeded to Off-Road (J.A. p. 349), Foreman and the Bartons agreed that a Complaint be filed against Pedersen and Off-Road to make the Foremans whole as to the damages they had incurred as a result of the action of Pedersen and Off-Road, they agreed that the partnership would retain its pursuit of the subject property and signed a letter waiving a conflict of interest in order that counsel might represent the partnership and the Foremans in the litigation (J. A. p. 350). The Foremans remained in possession pending remodeling and showed the property to persons inter-

ested in buying in excess of $625,000.00 (J. A. p. 351). One of those persons actually purchased the property from Respondent Osborne et al. (purchasers at the foreclosure sale) for the $660,000.00 (J. A. p. 351).

There was evidence that $11,784.27 over the amount due the holder of the first was never paid to the Debtor or the Foremans (J. A. p. 324).

A copy of the Motion for Relief From Stay on behalf of Imperial and the proposed Order Granting the Motion in the prior involuntary bankruptcy proceeding were mailed to the address shown on the involuntary petition by Off-Road in spite of the fact that the proposed order dismissing that involuntary petition showed as attorney for Barton, Roy B. Woolsey, and his address, and BFP's answer to the petition for adjudication showed its correct and current address

(J. A. p. 328). Yet, the fact that Imperial was seeking relief from stay in that proceeding was not brought to the attention of BFP, its partner, or the attorney for its partner (J. A. p. 328). The only asset of the partnership initially was the real property involved in this case (J. A. p. 330). The property was worth about $700,000.00 and yet on the foreclosure sale went for about $433,000.00 (J. A. p. 331) or $433,600.00. (J. A. p. 232).

SUMMARY OF ARGUMENT [RULE 24.1(h)]

The court of appeal held that the high bid at a regularly conducted noncollusive foreclosure sale established an irrebuttable presumption that the bid was the reasonably equivalent value (J.A. p. 23) and on that ground affirmed. The BAP repeated the rule of In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd on

other grounds (no transfer), 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U. S. 833, 83 L.Ed 66, 105 S. Ct. 125 (1984) that such a sale "establishes 'reasonably equivalent value' as a matter of law." (Appendix to Amended Petition for Writ, pp.54-55).

The 11 U.S.C. Section 548 makes no exception for mortgage foreclosures or trust deed foreclosures.

Where the plain language of a statute is clear, unambiguous and without a scrivener's error, there is no room for question as to its meaning and the court should not turn to legislative purpose, policy, history, or other extrinsic factors in interpreting a statute.

If the purpose or policy of the statute is relevant to a determination of what Congress intended, then the purpose and policy of the Bankruptcy Code is to bring property back into the estate for

the benefit of general creditors and even possibly for the benefit of the bankrupt himself; exempting foreclosure sales from the avoidance posers is contrary to that purpose or policy.

The questions presented for review as stated in the Petition for Writ and the Reply Briefs thereto appear to limit the scope of this review to the issues referred to above.

The Bankruptcy Court ruled in favor of the buyers, respondents Osborne, et al., squarely on the grounds that the bid price established a reasonably equivalent value and that a foreclosure is not a transfer. That court placed its holding on the summary judgment in favor of Imperial on the grounds that the bid price established the reasonably equivalent value and an interest in the property of the Debtor property was not transferred.

The Ninth Circuit Court held that the Debtor had an interest in the property which was foreclosed. This ruling should govern. If, somehow, that ruling is open to question, the Debtor had an interest of record in the property as grantee of Wayne Pedersen as to one-half of the property, a right as a co-tenant with the Foremans under the judgment quieting title, and an interest directly from the Foremans (page 11 above; J. A. pages 43 to 49 and 319).

The requirements in Section 548 of insolvency and time (one year) were not considered by any court below. Those facts were alleged in the Complaint and remain unchallenged. In any event, the facts will show that the Debtor met those requirements.

ARGUMENT [RULE 24.1(i)]

A. UNDER THE STANDARD OF REVIEW BY THIS COURT OF THE LOWER COURT DECISIONS, IN THIS CASE THERE IS NO SUBSTANTIAL FACT IN FAVOR OF RESPONDENTS.

In Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed.2d 80 (1957) in reversing a judgment on the pleadings, this Honorable Court said:

> "In appraising the sufficiency of the Complaint, we follow, of course, the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief."

The Ninth Circuit conformed to the foregoing in Kelson v. Springfield, 767 F.2d 651 (9th Cir. 1988) where it said:

> "A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and is subject to de novo review . . . in reviewing such a dismissal we must accept all material allegations in the Complaint as true, and construe them in the light most favorable to the appellant . . . dismissal

> for failure to state a claim is proper only if it appears to a certainty that the plaintiff would be entitled to no relief under any stated facts that could be proved. . . ."

In reviewing a summary judgment, the Ninth Circuit ruled that the decision is reviewed de novo in In re Kirkland, 915 F.2d 1236, 1238, (9th Cir. 1990).

In Vette Co. v. Aetna, 612 F.2d 1076, 1077 (CA 8th 1980) in reversing a summary judgment the court said that the reviewing court ~~is~~ gives the party opposing the summary judgment (the Debtor):

> "the benefit of all reasonable inferences to be drawn from the fact disclosed in the pleadings and affidavits."

In accord: Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd. Cir. 1980).

As to both the dismissal and the summary judgment "or" judgment on the pleadings, the Court of Appeals considers

questions of law de novo applies to appeals from the Bankruptcy Court: In re Alcala, 918 F.2d 99, 103 and In re Arctic AirTemp. Inc., 68 B.R. 71, 74 (1986).

B. THE PLAIN UNAMBIGUOUS LANGUAGE OF 11 U.S.C. 548 INCLUDES FORECLOSURES IN THE AVOIDANCE POWERS.

The plain unambiguous language of 11 U.S.C. 548 makes it clear that the statute applies to nonc~~o~~onclusive mortgage foreclosure sales even if regularly conducted under state law. There is no need to look to the purpose of statute or the policy behind it.

At all times since 1978, 11 U.S.C. Section 548(a)(2)(A) and (a)(2)(B)(i) provides in plain language that a trustee may avoid

" 'any transfer'

of an interest of Debtor in

property,

made within one year before the date of the filing of the Petition,

if the Debtor . . . received less than a reasonably equivalent value in exchange for such transfer . . . and

was insolvent . . . or became insolvent as a result of such transfer . . . ."

Petitioner's contention is made clearer by the 1984 amendment to code section 548 which inserted (after "Debtor" and before the "received less than the reasonably equivalent value") the words "voluntarily or involuntarily" and added to the definition of transfers in 11 U.S.C. 101 "foreclosure of Debtor's equity of redemption."

The Code does not except mortgage foreclosures. The amendment in 1984 to

Section 548 to include "involuntary" transfers and the addition of foreclosure of an equity of redemption to the definition of transfers in Section 101 make it even clearer.

In 1984, Sections 101 and 548 were amended to change the rule announced in In re Madrid, Madrid v. Lawyers Title Ins. Corp., supra. In that case, the BAP held that at a noncollusive regularly conducted sale the high bid was the reasonably equivalent value and the Court of Appeal held that a foreclosure sale was not a transfer.

The constitutional statutes must be given effect according to the language thereof. The intent of Congress is to be determined from the face of a clear and unambiguous statute.

In Union Bank v. Wolas, 502 U.S. ____, 116 L. Ed.2d 514, 112 S. Ct. 527, 534, 22 BCB 574, 25 CDC 2d 1011, CCH

Bankr. L. Rptr. paragraph 74,296A, this Honorable Court said:

> "It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a court of appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was here no contention of a 'scrivener's error, producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."

In Toibb v. Radloff, 501 U.S. ____, 115 L.Ed. 2d 145, 152, 111 S.Ct. 2197, 2200 (1991), in holding that a person without a business could file under Chapter 11 of the Bankruptcy Code, the court said:

> "In our view, the plain language of the Bankruptcy Code disposes of the question before us . . . Congress knew how to restrict recourse to the avenues of bankruptcy relief, it did not place Chapter 11 reorganizations beyond the reach of a non-business debtor." (p. 151)

> "First, this Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." Blum v. Stenson, 4645 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S.Ct. 1541 (1984). The language of Section 109 is not unclear. Thus, although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here." (p. 152)

In accord: United States v. James, 478 U.S. 597, 92 L.Ed.2d 483, 493, 106 S. Ct. 3116.

In United States v. Turkette, 452 U.S. 576, 69 L. Ed.2d 246, 101 S. Ct. 2524 (1981), in holding that enterprise and the racketeer influence and corrupt organizations part of the organized crime control act of 1970 included illegitimate enterprises the court said:

> "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'. Consumer Product

Safety Comm'n. vs. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed.2d 766, 100 S. Ct. 2051.

The Ninth Circuit candidly acknowledged that both Durrett and the Seventh Circuit's holding in In re Bundles, 856 F.2d 815, 18 BCD 554, CCH Bankr.L.Rptr Section 7246 (7th Cir. 1988), derived from a "plain-language interpretation of Section 548(a)(2)." In re BFP, 974 F.2d at 1148. Indeed, the Court recognized the Seventh Circuit's conclusion that "[g]ranting an irrebuttable presumption of reasonable equivalence . . . effectively creates a judicial exception to the trustee's avoiding powers. . . ." In re BFP, 974 F.2d at 1148.

In holding that a mortgage foreclosure can be avoided under 11 U.S.C. Section 548, in First Fed Sav. & Loan Ass'n Bismark v. Hulm. (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990 105 S.Ct. 398, 83

L.Ed 2d 331 (1984), the court wisely observed:

> "the Bankruptcy Code provisions are clear . . . and direct the result we have reached. Hence, policy considerations cannot affect the outcome of the case but must be addressed, if at all, by Congress."

In the Matter of Bundles, 856 F.2d 815, 821 (7th Cir. 1988) the Court said it began its analysis with the language of the statute which provides

> ". . . a transfer of the debtor's property may be set aside if it is transferred for less than a reasonably equivalent value.
>
> "It makes no distinction between sales that do and sales that do not comply with state law. If we take the statute at face value, we must conclude that its unambiguous language requires a reviewing court to make an independent assessment of whether evidence of reasonable equivalence was given."

C. IF THE PURPOSE OF 11 U.S.C. 548 IS TO BE CONSIDERED, INCLUSION OF FORECLOSURES IS CONSISTENT

AND EXCLUSION OF FORECLOSURES INCONSISTENT WITH THE PURPOSE.

If the court is going to look at the purpose or the policy of the statute, the court should take into account that policy and the purpose of 11 U.S.C. Section 548 is to recover property for the estate of the bankrupt, it is not to encourage mortgage foreclosure sales. The Ninth Circuit Court stated that adopting the irrebutable presumption of reasonable equivalence would undermine the trustee's power to recover lost equity "which is the purpose of Section 548 avoiding powers,. . ." (In re BFP, 974 F.2d 1144, 1148; Appendix to Amended Petition for Writ, p. 20).

If the court is to consider the purpose of the statute at all, the purpose supports petitioner's position.

The Ninth Circuit Court referred to Professor Scott B. Ehrlich's article as

support for its view that it makes little sense to interpret 11 U.S.C. 548 in a way that will likely discourage healthy foreclosure bidding (Appendix to Amended Petition, pp. 21-22). The court entirely ignored Ehrlich's comments in the same article to the effect that the sufficiency of state procedures would require a case by case analysis but the inquiry into foreclosure procedures would generate rules of law upon which future market participants can rely. He said that if state procedures are upgraded to market the property effectively and to increase the number of prospects purchasing at the sale, the value paid to the highest bidder will be closer to the non forced sale fair market value of the property, thus reducing the justification for avoiding the sale of a fraudulent conveyance (Appendix to Amended Petition, p. 79-80). He said federal courts should

enforce 548 until state procedures are revamped. (Appendix to Amended Petition for Writ p. 81).

Along this line, Frank R. Kennedy in Involuntary Fraudulent Transfers, published in Volume 9, Cardoza Law Review, December 1987, p. 542, 578-580 said:

> "In the meantime, the vulnerability of an involuntary transfer to avoidance as a constructive fraud should encourage lienor or lessor to exercise care to maximize the consideration passing or to minimalize the loss resulting to the debtor to the enforcement of rights on default.[196] The plethora of successful attacks on involuntary transfers as constructive fraud has focused needed attention on the unsatisfactory state of procedures for lien enforcement and lease termination. If the critics and supporters of Durrett can join in efforts directed toward the improvement of these procedures, the final outcome of the preoccupation with the Durrett doctrine will surely be a serendipitous benefit to debtors and creditors . . ."

Said footnote 196 states:

> "The argument that the application of the Durrett doctrine will

> encourage bidders at foreclosure or execution sales to lower their bids attributes to them a perverse incentive to incur the risk of avoidance of their purchases."

Randolph J. Haines, "Ninth Circuit Rejects Durrett" April 1993, 93-No.4, issue of Norton Bankruptcy Law Adviser, pp. 9-10, says of this problem:

> "The Court cites Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933 (1985), for the argument that the possibility of upsetting a foreclosure sale would cause such market uncertainty as to chill the bidding. In re BFP, 974 F.2d at 1148. In fact, however, Professor Ehrlich rejected the BAP's Madrid result for two carefully analyzed reasons. First, the author argued that 'the long history of fraudulent conveyance provisions strongly supports an interpretation of section 548(a)(2) that permits the trustee to recapture such a loss." Ehrlich, 71 Va L.Rev at 935-936. Second, Professor Ehrlich established that "forced sales do in fact bring less than fair retail market value for the property and thus constitute improvident transfers from the perspective of the debtor's unsecured creditors.' Ehrlich, 71 Va L.Rev at 958. Indeed, Professor Ehr-

lich astutely observed that the proliferation of antideficiency legislation attests to recognition by state legislatures that foreclosure sales prices to not reflect reasonably equivalent values, belying the comity argument. Ehrlich, 71 Va L. Rev. at 959. Consequently, Professor Ehrlich argued for improvement in foreclosure sale procedures, such as advertising and providing time to obtain financing, rather than demanding cash within 24 hours. But he concluded that

> 'Until state foreclosure pro proceedings are upgraded to produce a value close to the fair value of the property under forced sale conditions, the purpose and function of section 548(a)(2) is precisely to allow the trustee to pierce the finality of the foreclosure sale and determine, under the circumstances, whether a reasonably equivalent value has been received for the debtor's interest.'

Ehrlich, 71 Va L. Rev. at 962.

In short, the Ninth Circuit's sole authority for the Madrid result persuasively demonstrated its fallacies. Instead, Professor Ehrlich's article provides strong support for the Bundles approach (The Seventh Circuit decision subsequent to the article), which encourages improvement in the foreclosure procedures by preserving a sale below

> appraised value only if adequate advertising had been done. See Haines, Norton Bankruptcy Law Adviser, Court Proposes Novel Solution to Durrett, 1989--No. 10.

As said by Philip Schuchman, Data on Durrett, 9 Cardoza Law Review 605:

> ". . . There is very little evidence in the sources cited for these assertions about the harmful effects of statutory redemption under state laws. A 1958 article in the Business Lawyer (the American Bar Association section journal) states that 'the facts . . . demonstrated by actual experience, show the following:
> (1) Only 0.927%, or less than 1%, of properties foreclosed is ever redeemed; . . .
> (3) In 99.3% of "public" sales, the mortgagee is the buyer' . . . (at pp. 616-617)
>
> ". . . These critics [of the power to avoid a trustee's sale under 548] cite almost no empirical evidence on the effect of statutory redemptions under state law, and what little there is largely dates from the Great Depression of the 1930's . . . It may be that, even now, state redemption statutes are little-used by mortgagors who have defaulted and where homes have been foreclosed. But that does not prove at all that bid prices are lower because of state re-

demption laws." (at page 618)

D. MOST COURTS OF APPEAL HAVE DECIDED THE ISSUE IN ACCORDANCE WITH PETITIONER'S CONTENTIONS AND THEIR REASONING IS PERSUASIVE.

The granddaddy of the cases is, of course, Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980), decided under the Bankruptcy Act, Section 67(d) (pre-1978 effective date of the Bankruptcy Code) which provided for avoiding transfers without fair consideration. It held that the sale be set aside and in dicta, by implication, established the so-called 70% rule.

In Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.) cert. denied, 454 U.S. 1164, 102 S.Ct. 1 1038, 71 L.Ed.2d 320 (1981) applied the rule under the Bankruptcy Act.

The 5th Circuit held that that was

still the rule even under the Bankruptcy Code: Federal Deposit Insurance Corp. v. Blanton, 918 F.2d 524, 537, fn. 7 (5th Cir. 1990).

In re First Savings & Loan Ass'n Bismarck v. Hulm (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990, 105, S. Ct. 380, 398, 83 2d 331 (1984) is quoted above.

In the Matter of Grissom, 955 F.2d 1440 (11th Cir. 1992), in reversing a judgment avoiding the foreclosure sale, the Eleventh Circuit Court adopted a rule in conflict with the decision to be reviewed and remanded for further consideration by the trial court (in accordance with the rule said circuit court adopted). The court said that we must endeavor to prevent foreclosure sales which unnecessarily deplete the resources of a bankruptcy estate (p. 1442), and:

> "one factor in rebutting the presumption of reasonableness is

> . . . the foreclosure sale achieved less than 70% of the property's markup value . . ., courts should consider whether or not the foreclosing party obtained a fair appraisal, the extent to which advertised, and the competitive conditions surrounding the sale", (p. 1446)

Bundles v. Baker, (In re Bundles), 856 F.2d 815 (7th Cir. 1988). There the court said:

> "Accordingly, we must reject the view that state law, either directly or as the federal rule of decision, should determine the outcome of a bankrupt's complaint under section 548(a)(2)(A). Here, Congress has set forth a federal standard. We must give effect to that congressional will, however ambiguous its manifestation." (p. 822)

See also Barrett v. Commonwealth Federal Savings Ass'n, 939 F.2d 20, 23-25 (3rd Cir. 1991) saying that there was no irrebuttable presumption but finding reasonably equivalent value in that case and reversing the order avoiding the sale.

In Judge Volinn's dissent in BAP decision in this case cited several

decisions of lower courts in other circuits which are contrary to the decision under review (App. p. 46).

It is difficult to reconcile the decision under review with In re Ehring, 900 F.2d 184 (9th Cir. 1990). There the Court of Appeal ruled that a mortgage foreclosure sale was a transfer for the purposes of 11 U.S.C. 547 (d) on avoiding pre-petition preferences. There, at page 187, the court stated that in 1984 Congress amended the definition of "transfer" to include the "foreclosure of the debtor's equity of redemption," 11 U.S.C. Section 101[58](54) and "foreclosure is a transfer for purposes of fraudulent conveyances (11 U.S.C. 548)". Thus, in Ehring the 1984 amendments were applied;

An amendment to Sec. 548 to provided an irrebuttable presumption that the price bid was reasonably equivalent was

proposed and not adopted as said in Bundles v. Baker, supra. The decision to be reviewed seeks to insert such a provision in the statute.

The Third, Fifth, Seventh, Eighth and Eleventh Circuits have construed the statute in accordance with our contention.

The only cases decided by a court of appeal to the contrary are the case under review, BFP vs. Resolution Trust Company and the decision in the Matter of Winshall's Settlors' Trust, 758 F.2d 1136 (6th Cir. 1985) involving a transfer that occurred in 1983 before the 1984 amendments to 11 U.S.C. Sections 101 and 548.

E. A FORECLOSURE SALE IS A TRANSFER.

This issue may be reviewable under question two stated in the Amended Petition for Writ. On the motion to dismiss, the Bankruptcy Court said it was bound by

Madrid, supra, (bid on the foreclosure establishment of the reasonably equivalent value) and In re Ehring, 91 B.R. 897 (9th Cir. BAP 1988).

In Ehring the lead opinion did, in holding that a mortgage foreclosure avoided as a preference to a creditor under 11 U.S.C. Section 547, say that there was no transfer and that the amendments to the Bankruptcy Code did not overrule the Madrid case in that respect. Judge Jones, in a separate opinion, concurred in the result saying that the elements of preference were not present. Judge Mooreman dissented saying that one of the purposes behind the establishment of the Bankruptcy Code was to provide means to marshal a debtor's assets and allow for the regular distribution among all creditors (p. 903). He also said on said case that the bankruptcy amendments, including the Federal Judgeship Act of

1984, modified the Bankruptcy Code definitions of transfer to expressly include "foreclosure of debtor's equity of redemption." He went on to say that he felt that the amendments had the effect of overruling Madrid and "to hold otherwise would be to interpret the express statutory language in a manner inconsistent with the purpose of the Bankruptcy Code."

In 900 F.2d 184 (9th Cir. 1990) the court of appeal affirmed the judgment in Ehring for lack of a preference, but expressly said that the foreclosure sale is a transfer. At page 187, the court stated that Congress amended the definition of transfer to include foreclosure of the debtor's equity of redemption and "foreclosure is a transfer for the purposes of fraudulent conveyances (11 U.S.C. 548)."

Each case cited as holding that a

foreclosure sale does not establish reasonably equivalence and so is subject to the power of the avoidance under 548 implicitly, if not expressly, holds that a foreclosure is a transfer.

F. BFP IS ENTITLED TO THE EXCEPTION RECOGNIZED IN THE MADRID DECISION

~~/RM41~~

In this case the allegations and evidence showed that the sale had been continued and the holder of the second trust deed requested notice and was not given notice (Br. for Appellant in 91-56480, pp. 14-15, Br. for Appellant in 91-55632, p. 7, lines 11-25)

Even Madrid, 21 B.R. 424, 427 (1982) said:

" '[T]here must in addition [to inadequacy of price be]

> proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.'".

The foregoing is not limited to state law rights but is interpretation of a federal statute and a federal standard. In In re Tome, 113 B.R. 626 (Bktpcy C.D. Cal. 1990) the court wisely observed that after continuances of sale noticed as required by state law, the bankruptcy court could require notice in addition to notice required by state law.

G. RELIEF OTHER THAN RESTORATION OF THE PROPERTY IS AVAILABLE.

Resale (not in the record on the motion to DISMISS) presents no problem.

11 U.S.C. Section 550(a) provides that property or its value may be recovered; In re Lindsay, 98 B.R. 983, 992-3, (Bkrtcy. S.C. Cal. 1989), In re Coleman, 21 B.R. 832, 836-7 and In re Nance, 26

B.R. 105 (Bkrtcy. S.D. Ohio 1982) so held

H. THE DEBTOR HAS AN INTEREST IN THE PROPERTY WHICH WAS TRANSFERRED.

This is outside the stated questions to be reviewed. The Circuit Court of Appeals ruled in favor of petitioner on this point, and the facts in its opinion and hereinabove ~~to~~ support that decision and it appears that further argument on it is unnecessary.

CONCLUSION

The dismissal of the case for failure to state a claim should be reversed and the Bankruptcy Court should be ordered to deny the motion for dismissal.

The judgment granting the summary judgment or motion on the pleadings for Imperial likewise should be reversed and remanded to the trial court to deny the

motion.

Alternatively, the remand could be to the Ninth Circuit Court with instructions to make an order in accordance with the decision of this Honorable Court.

The issue of title was decided by the Ninth Circuit Court in favor of petitioner and that issue has not been stated to be a question to be reviewed in any petition or response. This court could remand it for further consideration of that issue but that issue has been decided and no need to undo it.

Dated: July 7, 1993.

RESPECTFULLY SUBMITTED,

_____
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D114:BFPSC.P93